86-1979

Supreme Court, U.S.
FILED
JUN 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE STATE OF TEXAS,
Petitioner

v.

CLAUDE LEE WILKERSON,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE 208TH DISTRICT COURT OF HARRIS COUNTY, TEXAS

JOHN B. HOLMES, JR.
District Attorney
Harris County, Texas

DON R. STRICKLIN
WINSTON E. COCHRAN, JR.
Assistant District Attorneys

CALVIN A. HARTMANN
Assistant District Attorney
Chief of the Appellate Section
Counsel of Record

201 Fannin, Suite 200
Houston, Texas 77002
Tel.: 713/221-5826

Attorneys for Petitioner

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

51 pp

QUESTIONS PRESENTED

I.

WERE THE APPELLANT'S WRITTEN AND ORAL CONFESSIONS THE FRUITS OF AN UNLAWFUL ARREST?

II.

WAS *EDWARDS V. ARIZONA* VIOLATED?

III.

WAS CUSTODIAL INTERROGATION JUSTIFIED UNDER THE EMERGENCY DOCTRINE?

IV.

WAS EVIDENCE OTHER THAN THE RESPONDENT'S STATEMENTS ADMISSIBLE UNDER THE DOCTRINE OF INEVITABLE DISCOVERY?

V.

WOULD THE TESTIMONY OF ACCOMPLICES OR OTHER EVIDENCE BE ADMISSIBLE UNDER *MICHIGAN V. TUCKER?*

SUBJECT INDEX

	Page
QUESTIONS PRESENTED	I
SUBJECT INDEX	II
LIST OF AUTHORITIES	III
ORDERS BELOW	2
JURISDICTION	2
A. Finality	3
B. Availability of a Higher Texas Court	6
CONSTITUTIONAL PROVISIONS AT ISSUE	8
STATEMENT OF THE CASE	9
I. PROCEEDINGS IN NUMBER 272,378	9
II. PROCEEDINGS ON REMAND	11
REASONS FOR GRANTING THE WRIT	13
I. WERE THE APPELLANT'S WRITTEN AND ORAL CONFESSIONS THE FRUITS OF AN UNLAWFUL ARREST?	13
II. WAS *EDWARDS V. ARIZONA* VIOLATED?	19
(a) The *Wilkerson* Dissent Was Correct	19
(b) No *Edwards* Violation Occurred	20
III. WAS CUSTODIAL INTERROGATION JUSTIFIED UNDER THE EMERGENCY DOCTRINE?	22
IV. WAS EVIDENCE OTHER THAN THE RESPONDENT'S STATEMENTS ADMISSIBLE UNDER THE DOCTRINE OF INEVITABLE DISCOVERY?	23
V. WOULD THE TESTIMONY OF ACCOMPLICES OR OTHER EVIDENCE BE ADMISSIBLE UNDER *MICHIGAN V. TUCKER*?	26
CONCLUSION	29
APPENDIX A—Excerpt of Trial Court's Ruling Regarding Admissibility of Respondent's Written Confession in Numbers 272,379 and 272,380	1a
APPENDIX B—Respondent's Motion to Suppress Oral Statements, Physical Evidence, and Testimony by Accomplices	4a
APPENDIX C—State's Motion to Reconsider Admissibility of Evidence	11a

LIST OF AUTHORITIES

CASES	Page
Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L.Ed. 2d 416 (1975)	17
Brown v. Texas, 443 U.S. 47, 99 S. Ct. 2637, 61 L.Ed.2d 357 (1979)	7, 8
California v. Stewart, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966)	3, 4
Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 5 L.Ed. 257 (1821)	8
Connecticut v. Barrett, _____U.S._____, 107 S. Ct. 823, _____L.Ed.2d_____ (1987)	27
Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L.Ed.2d 328 (1975)	3, 4, 12
Dunn v. State, 696 S.W.2d 561 (Tex. Crim. App. 1985), *cert. denied* _____U.S._____, 106 S. Ct. 1478, 89 L.Ed.2d 732 (1986)	21
Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L.Ed.2d 378 (1981)	11, 12, 19, 21, 23, 24, 26, 28
Florida v. Meyers, 466 U.S. 380, 104 S. Ct. 1852, 80 L.Ed. 2d 381 (1984)	4, 5
Fuentes v. Moran, 572 F.Supp. 1461 (D.R.I. 1983), *aff'd* 733 F.2d 176 (1st Cir. 1984)	21
Keister v. Cox, 307 F.Supp. 1173 (W.D. Va. 1969)	28
Kentucky v. Powers, 201 U.S. 1, 26 S. Ct. 387, 50 L.Ed. 633 (1906)	8
Largent v. State of Texas, 318 U.S. 418, 63 S. Ct. 667, 87 L.Ed. 883 (1943)	7
Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 70 S. Ct. 252, 94 L.Ed. 562 (1950)	19
Michigan v. Clifford, 464 U.S. 287, 104 S. Ct. 641, 78 L.Ed. 2d 477 (1984)	5
Michigan v. Tucker, 417 U.S. 433, 94 S. Ct. 2357, 41 L.Ed. 2d 182 (1974)	13, 26, 27, 28
Miller v. State, 667 S.W.2d 773 (Tex. Crim. App. 1984)	24
Mills v. Alabama, 384 U.S. 214, 86 S. Ct. 1434, 16 L.Ed. 2d 484 (1966)	6
Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L.Ed. 2d 290 (1978)	16, 17
Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed. 2d 694 (1966)	17, 18, 22, 23, 27, 28
Moran v. Burbine, 475 U.S. _____, 106 S. Ct. 1135, 89 L.Ed.2d 410 (1986)	21, 27

CASES Page

New York v. Quarles, 467 U.S. 649, 104 S. Ct. 2626, 81 L.Ed.2d 550 (1984) 5, 22, 23, 27, 28
Nix v. Williams, 467 U.S. 431, 104 S. Ct. 2501, 81 L.Ed. 2d 377 (1984) 24
Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285, 84 L.Ed. 2d 222 (1985) 27, 28
Powell v. Texas, 392 U.S. 514, 88 S. Ct. 2145, 20 L.Ed.2d 1254 (1968) 7
Self v. State, 709 S.W.2d 662 (Tex. Crim. App. 1986) 17
Shea v. Louisiana, 470 U.S. 51, 105 S. Ct. 1065, 84 L.Ed.2d 38 (1985) 11
Smalis v. Pennsylvania, _____U.S._____, 106 S. Ct. 1745, _____L.Ed.2d_____ (1986) 5
South Dakota v. Neville, 459 U.S. 553, 103 S. Ct. 916, 74 L.Ed.2d 748 (1983) 4, 5
State ex rel. Vance v. Routt, 571 S.W.2d 903 (Tex. Crim. App. 1978) 7
Stone v. State, 612 S.W.2d 542 (Tex. Crim. App. 1981) .. 20
Texas v. Wilkerson, 470 U.S. 1008, 105 S. Ct. 1371, 84 L.Ed.2d 390 (1985) 11
United States v. Ceccolini, 435 U.S. 268, 98 S. Ct. 1054, 55 L.Ed.2d 268 (1978) 26
United States v. Good, 780 F.2d 773 (9th Cir. 1986) 16
United States v. Jones, 635 F.2d 1357 (8th Cir. 1980) 16
United States v. Nobles, 422 U.S. 225, 95 S. Ct. 2160, 45 L.Ed.2d 14 (1975) 21
Vanderbilt v. State, 629 S.W.2d 709 (Tex. Crim. App. 1981), *cert. denied* 456 U.S. 910, 102 S. Ct. 1760, 72 L.Ed.2d 169 (1982) 24
Wayne v. United States, 115 U.S. App. D.C. 234, 318 F.2d 205 16
West v. State, 720 S.W.2d 511 (Tex. Crim. App. 1986) ... 15
Wilkerson v. State, 657 S.W.2d 784 (Tex. Crim. App. 1983) 2, 11, 13, 14, 18, 19, 20, 21, 24, 28
Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1983) 23, 27

Page

UNITED STATES CONSTITUTION

Fourth Amendment 8, 13, 14, 16, 17, 22, 26
Fifth Amendment 9, 13, 21, 22, 27, 28
Fourteenth Amendment 9

UNITED STATES STATUTES

28 U.S.C. § 1257 2

TEXAS CONSTITUTION

Article V, Section 26 ..... 6, 7

TEXAS CODE OF CRIMINAL PROCEDURE

Article 4.03 7
Article 14.01 14
Article 14.04 15
Article 24.15 15
Article 37.071(b) 11
Article 38.22, § 3(c) 20
Article 38.23 ..... 23, 24
Article 42.01 4
Article 44.01 7

TEXAS PENAL CODE

Section 19.03 9
Section 20.03 6
Section 29.03 6
Section 37.03 14

MISCELLANEOUS

Houston Chronicle, May 12, 1987, page 13 6

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE STATE OF TEXAS,
Petitioner

v.

CLAUDE LEE WILKERSON,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE 208TH DISTRICT COURT OF HARRIS COUNTY, TEXAS

Petitioner respectfully requests that a writ of certiorari issue to the 208th District Court of Harris County, Texas, where indictments against the Respondent for capital murder are pending, in order for this Court to review the orders by the judge of the district court, Hon. Thomas Routt, suppressing evidence in the cases of The State of Texas v. Claude Lee Wilkerson, numbers 272,378, 272,-379 and 272,380.

ORDERS BELOW

District courts in the State of Texas do not issue and publish written opinions as federal district courts do. In these cases the Petitioner is requesting review of an order which was dictated into the record on April 6, 1987 (reproduced in Appendix A), a written order signed on May 11, 1987 (reproduced in Appendix B), and an order signed by the trial court on May 26, 1987, denying the Petitioner's motion to reconsider the admissibility of evidence (reproduced in Appendix C). Pertinent motions also appear in the respective appendices.

JURISDICTION

These cases currently are pending in the trial court, the 208th District Court of Harris County, Texas. In the trial court, no determination of the Respondent's guilt or innocence has been made.[1] At this point, however, vital decisions as to the admissibility of evidence have been made in the trial court, based on federal constitutional arguments.

Under 28 U.S.C. § 1257, this Court has jurisdiction to review "final judgments or decrees rendered by the highest Court of a State in which a decision could be had . . . by writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of . . . the United States." In most cases, that stage is only reached when the highest

1. One jury already has determined in Number 272,378 that the Respondent is guilty of the capital murder of William Fitzpatrick. On appeal from that conviction, the Respondent did not even contest the sufficiency of the evidence. *Wilkerson v. State*, 657 S.W.2d 784, 785, fn. 1 (Tex. Crim. App. 1983). Number 272,379 concerns the capital murder of Georgina Rose and Number 272,380 concerns the capital murder of Donald Fantich.

appellate court of a State has decided the case or declined to review it. That is not always the situation, though. The circumstances of these cases satisfy the dual requirements of "finality" and "the highest court."

A. Finality

At this point the cases are still pending in the district court prior to trial on the merits, but the orders already issued in these cases satisfy the finality requirement for purposes of this Court's jurisdiction. *Cox Broadcasting Corporation v. Cohn,* 420 U.S. 469, 477, 95 S. Ct. 1029, 1037, 43 L.Ed.2d 328 (1975) stated the general rule that review by this Court is precluded where anything further remains to be determined by a state court, but further noted that there are some circumstances which justify a departure from that standard. *Cox Broadcasting* listed four categories of such exceptions. The current posture of these cases seems to fit within the third exception mentioned in *Cox Broadcasting,* 420 U.S. at 481, 95 S. Ct. at 1039, or at least is closely analogous to that exception:

> In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review. The Court has taken jurisdiction in these circumstances prior to completion of the case in the state courts. *California v. Stewart,* 384 U.S. 436, 86 S. Ct.

> 1602, 16 L.Ed.2d 694 (1966) (decided with *Miranda v. Arizona*), epitomizes this category. There the state court reversed a conviction on federal constitutional grounds and remanded for a new trial. Although the State might have prevailed at trial, we granted its petition for certiorari and affirmed, explaining that the state judgment was "final" since an acquittal of the defendant at trial would preclude, under state law, an appeal by the State. *Id.*, at 498 n. 71, 86 S. Ct., at 1640.[2]

Similar reasoning led this Court to find that it had jurisdiction in *South Dakota v. Neville,* 459 U.S. 553, 558, n. 6, 103 S. Ct. 916, 919, 74 L.Ed.2d 748 (1983), even though "as yet . . . there has been no final judgment in this case."[3] See also *Florida v. Meyers,* 466 U.S. 380,

---

2. Arguably the first exception mentioned in *Cox Broadcasting* also applies:

> In the first category are those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained. In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final.

The pretrial orders of suppression issued in these cases are so drastic in their impact that the outcome of further proceedings may be considered "preordained", notwithstanding the fact that the formalities of trial on the merits remain. The Respondent's counsel apparently takes that view as well, having demanded a speedy trial at the May 26 hearing and suggesting that a jury of "the first twelve people" would do. The test is not whether a situation fits neatly within a previously recognized exception, but whether the circumstances show a virtual completion of the litigation in the lower court on the federal constitutional issue.

3. At this point there is no document in these cases which would fit within the definition of a "judgment" under Texas law, TEX. CODE CRIM. PROC. ANN. art. 42.01, but footnote 8 in *Cox Broadcasting* indicates that review is not limited to formal judgments under governing State law. The test is whether there has been "an effective determination of the litigation."

104 S. Ct. 1852, 80 L.Ed.2d 381 (1984), *Michigan v. Clifford,* 464 U.S. 287, 104 S. Ct. 641, 78 L.Ed.2d 477 (1984), and *New York v. Quarles,* 467 U.S. 649, 104 S. Ct. 2626, 81 L.Ed.2d 550 (1984).

Here, unlike *Stewart, Neville, Meyers, Clifford* and *Quarles,* the rulings at issue were the product of the trial court, though based in part on the trial judge's perception that the Court of Criminal Appeals left him no choice. Nevertheless, the trial court's rulings herein were as conclusive and damaging as an appellate disposition would be. In these cases the party seeking interim review, *i.e.* the State of Texas as Petitioner, cannot realistically expect or hope to prevail on the merits when crucial items of the State's evidence have been suppressed. If the State loses on the merits, which seems likely, governing Texas law will not permit the State to present its federal constitutional arguments for state appellate review, for reasons explained below. Moreover, double jeopardy principles would bar a retrial following an acquittal, and the Petitioner could not appeal a verdict of acquittal. *Smalis v. Pennsylvania,* ____U.S.____, 106 S. Ct. 1745, ____ L.Ed.2d____ (1986).

The trial court has signed suppression orders regarding written and oral statements, physical evidence, and any testimony by accomplices. The Petitioner filed a motion which requested that the trial court reconsider its ruling, but that motion was denied as to all things on May 26, 1987.[4] There is no reasonable possibility that the trial court will alter those rulings.

---

4. The motion had requested *inter alia* that the State be allowed to present further evidence on some points, but that was denied along with the other relief requested in the State's motion.

If the trial judge's suppression order is allowed to stand, the likelihood of a successful murder prosecution, let alone a successful capital murder prosecution, is almost nil.[5] A murder trial or capital murder trial "would be no more than a few formal gestures." *Mills v. Alabama*, 384 U.S. 214, 217, 86 S. Ct. 1434, 1436, 16 L.Ed.2d 484 (1966). There also may be impediments to prosecution for lesser included offenses other than murder. Even assuming that no procedural barriers exist, there would be evidentiary problems.[6] A possibility exists that the trial court's ruling will preclude the State from obtaining any meaningful conviction or an adequate punishment.

B. Availability of a Higher Texas Court

The reason why the Petitioner must come to this Court at this time is rooted in a legal restriction on the Petitioner which is unique in modern America—the State of Texas has absolutely no right of appeal from adverse rulings in a trial court. TEX. CONSTITUTION, Art. V, Sec.

---

5. The Respondent's counsel has expressed that view publicly: "I have never seen a murder case tried without a murder weapon and a murder victim," Stanley Schneider, Wilkerson's attorney, said after Routt's ruling. *Houston Chronicle*, May 12, 1987, page 13.

6. The suppression of the evidence also makes a successful prosecution for aggravated robbery, under TEX. PENAL CODE ANN. § 29.03, unlikely. In theory the State might be able to proceed on a theft prosecution, based on a small amount of jewelry delivered by the Respondent to a "fence". At this time, as shown by testimony developed at a hearing, the "fence" is a fugitive from justice, and it is extremely unlikely that he will be available as a witness. Perhaps a kidnapping prosecuton under TEX. PENAL CODE ANN. § 20.03 would be possible, but without the suppressed evidence the State would have considerable difficulty obtaining such a conviction.

26; TEX. CODE CRIM. PROC. ANN. art. 44.01.[7] The Petitioner went through the motion of giving notice of appeal here, but under current Texas law the trial judge could do nothing but deny any continuance premised on a State's appeal.[8]

These cases would not present the first occasion on which this Court has reviewed cases which, for one reason or another, could not be appealed to Texas appellate courts. Until 1981, due to TEX. CODE CRIM. PROC. ANN. art. 4.03 and its forerunners, no further appeals were permitted in criminal cases which had been appealed to a county court from a justice or municipal court and which resulted in punishment of a fine of less than one hundred dollars. Therefore this Court granted certiorari and decided the constitutional issues presented in *Largent v. State of Texas,* 318 U.S. 418, 63 S. Ct. 667, 87 L.Ed. 883 (1943), *Powell v. Texas,* 392 U.S. 514, 517, fn. 1, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968), and *Brown v. Texas,* 443 U.S. 47, 50, 99 S. Ct. 2637, 2640, 61 L.Ed.

---

7. Other jurisdictions limit the government's right of appeal in various ways, but only Texas completely deprives the State government of the right of appeal. The Texas Court of Criminal Appeals has recognized that the State may seek a writ of mandamus to compel a trial court to take an action required by State law which is purely ministerial, but the writ of mandamus will not issue to compel an act which is discretionary. *State ex rel. Vance v. Routt,* 571 S.W.2d 903, 907 (Tex. Crim. App. 1978).

8. The State of Texas does have the right to petition the Court of Criminal Appeals for discretionary review of a decision by an intermediate court of appeals, but Article 44.01 prevents the State of Texas from appealing an adverse trial court ruling to the court of appeals in the first place. A petition for discretionary review of a trial court ruling is not authorized; Article 44.01 only states that "this statute shall not be construed to prevent the State from petitioning the Court of Criminal Appeals to review a *decision of a court of appeals* in a criminal case . . ." (emphasis added).

2d 357 (1979). Other cases in which this Court assumed jurisdiction because a party had no recourse beyond the trial court under State law were noted in *Kentucky v. Powers,* 201 U.S. 1, 26 S. Ct. 387, 399, 50 L.Ed. 633 (1906), including *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 5 L.Ed. 257 (1821).[9]

In *Cohens, supra,* Chief Justice Marshall observed:

> It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. 6 Wheat. at 404, 5 L.Ed. at 291.

In light of the inevitability of the trial results if the suppression orders stand, the lack of an adequate appellate remedy for the Petitioner in Texas appellate courts, the gravity of the Respondent's crimes, and the importance of the issues presented, this Court should take jurisdiction.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fourth Amendment of the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

---

9. See footnote 2 in Chief Justice Marshall's opinion in *Cohens,* 6 Wheat. at 376, 5 L.Ed. at 284.

The Fifth Amendment of the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself,* nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Emphasis added)

The Fourteenth Amendment of the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added)

STATEMENT OF THE CASE

I. PROCEEDINGS IN NUMBER 272,378

The Respondent, Claude Lee Wilkerson, was indicted for three capital murders under TEX. PENAL CODE ANN. § 19.03. The evidence presented to a jury trying Number

272,378 showed that the Respondent worked for a Houston pawn shop owner, Don Fantich.[10] On January 23, 1978, the Respondent and two colleagues, David Roeder and Mark Cass, kidnapped Don Fantich, jewelry store manager Georgina Rose, and Dr. William Fitzpatrick, who apparently chose a bad moment to visit the Fantich house. After looting the jewelry store, the Respondent, Roeder, and Cass took their hostages to an apartment shared by Roeder and Bobby Avila. Later Roeder, Cass, and Avila took the hostages to a farm in Shiner, Texas owned by Roeder's parents. All three victims were shot and buried in a shallow grave. Jewelry and one of the murder weapons were hidden at the farm. Cass and Roeder then went to Colorado.

The Respondent stayed in Houston, where he was taken into custody on January 24, 1978, and called before a grand jury on January 25 to testify concerning the disappearance of Fantich. After the grand jury proceedings, the Respondent was released. The next night he was checked into a hospital room through arrangements made by the Harris County District Attorney's office at the Respondent's request. There he was confronted by Assistant District Attorney Mike Hinton and investigating officers. Hinton told the Respondent that he believed the Respondent had perjured himself before the grand jury and that the Respondent should consider himself under arrest for perjury. The Respondent's attorney, Hon. Fred Dailey, told the police that they should not interrogate the Respondent in Dailey's absence. The next day, however, interrogation resumed at the police station, and later

---

10. Portions of the record from the trial of Number 272,378 were admitted as an exhibit for pretrial hearings in these cases.

at the District Attorney's office. The Respondent confessed to his role in the crime.

The jury found the Respondent guilty of capital murder and returned affirmative answers to the special issues submitted under TEX. CODE CRIM. PROC. ANN. art. 37.071 (b), resulting in assessment of the death penalty.

On May 18, 1983, the Texas Court of Criminal Appeals reversed the Respondent's conviction in a 5-4 decision. *Wilkerson v. State,* 657 S.W.2d 784 (Tex. Crim. App. 1983). The majority retroactively applied *Edwards v. Arizona,* 451 U.S. 477, 101 S. Ct. 1880, 68 L.Ed.2d 378 (1981) to find that the Respondent's Fifth Amendment right to counsel had been violated when interrogation continued after counselor Dailey told the police that they should not interrogate the Respondent in counsel's absence. A gratuitous footnote also asserted that the respondent had been arrested in violation of the Fourth Amendment, even though no such claim had been raised by the Respondent on appeal. 657 S.W.2d at 791, fn. 18. The State petitioned this Court for a writ of certiorari, contending *inter alia* that *Edwards v. Arizona* should not have been applied retroactively. Shortly after this Court decided *Shea v. Louisiana,* 470 U.S. 51, 105 S. Ct. 1065, 84 L.Ed.2d 38 (1985), this Court denied certiorari. *Texas v. Wilkerson,* 470 U.S. 1008, 105 S. Ct. 1371, 84 L.Ed.2d 390 (1985).

II. PROCEEDINGS ON REMAND

When Number 272,378 was returned to the district court, the Respondent sought to suppress the use of the confession in all three cases. The trial judge ruled that *Wilkerson* constituted the "law of the case" in Number

272,378, notwithstanding arguments by the State to the contrary, but ruled that the "law of the case" doctrine did not bar introduction of the confession in different cases, Cause Numbers 272,379 and 272,380. The issue then became whether admission was barred in the other two cases. After a lengthy hearing, the trial court ruled that the Respondent's detention had violated the Fourth Amendment, despite a variety of arguments presented by the State. The judge also ruled that the written confession was obtained in violation of *Edwards,* despite Texas case law subsequent to *Wilkerson* which was pointed out by the State. The trial court granted suppression of the Respondent's confession in Cause Numbers 272,379 and 272,380. See Appendix A.

The Respondent further sought suppression in all three cases of oral statements and a variety of evidentiary items which he claimed were the "fruits" of the unlawfully obtained confession:

(a) Evidence found at Roeder's apartment,

(b) Jewelry recovered at the Roeder farm,

(c) The weapons found at the Roeder farm,

(d) The bodies of the three victims, and

(e) The "person and identity" of Roeder, Cass, and Avila, and any testimony by those codefendants.

The State filed a brief and presented further arguments at a hearing conducted on May 11, 1987. At the conclusion of the hearing, the trial judge rejected all of the State's arguments. The judge found that the oral statement preceding the written confession was the product of the same impermissible interrogation process as the written

confession. The judge found that there were not sufficient attenuation factors to justify admission of oral statements which followed the written confession.[11] The judge did not accept the argument that the identity of David Roeder and evidence found at the farm would have been discovered even without the Respondent's confession. Finally, the judge rejected the State's argument, based on *Michigan v. Tucker,* 417 U.S. 433, 94 S. Ct. 2357, 41 L.Ed.2d 182 (1974), that the testimony of the accomplices should not be suppressed. The judge signed an order suppressing all items which the Respondent had sought to suppress. See Appendix B. The State's motion to reconsider all of those rulings was denied on May 26, 1987. See Appendix C.

REASONS FOR GRANTING THE WRIT

Since the trial court decided issues relating to both the Fourth Amendment and the Fifth Amendment, this Court needs to address the relevant issues pertaining to both amendments. Five questions warrant this Court's review.

I.

WERE THE APPELLANT'S WRITTEN AND ORAL CONFESSIONS THE FRUITS OF AN UNLAWFUL ARREST?

The trial court held, in its ruling dictated into the record on April 6, 1987, that the Respondent had been arrested in violation of the Fourth Amendment. The genesis of this ruling was the assertion in the *Wilkerson* opinion, particularly in footnote 18, that the respondent

11. The Respondent met with his counsel after giving the written confession. Later the Respondent showed officers where Roeder's apartment was located. Avila was apprehended at the apartment.

was being illegally held. Since the Court of Criminal Appeals did not rest its decision in *Wilkerson* on a Fourth Amendment basis, the State did not seek review of that holding in its first petition for writ of certiorari. On remand, however, the Respondent stressed this issue.

The trial court found a Fourth Amendment violation. In so doing, the trial court apparently rejected the State's arguments that (1) probable cause for the Respondent's arrest existed, (2) several different Texas statutes provided a valid basis for the Respondent's detention, (3) the arrest, if unlawful, was justified under the emergency doctrine, and (4) assuming arguendo the illegality of the arrest, the confession and other evidence were obtained under circumstances sufficiently removed from the taint of the arrest to overcome any Fourth Amendment violation. Though a petition for certiorari is not the place for a full development of any of these arguments, a few observations regarding each are set forth below.

(1) and (2). *Probable cause and Texas arrest statutes.* Prosecutor Hinton testified that he was involved in the grand jury proceedings where the Respondent appeared. Hinton also was supervising the overall investigation and had access to information gathered by various officers. This gave Hinton a basis for concluding that the Respondent had committed perjury before the grand jury, which is a felony. TEX. PENAL CODE ANN. § 37.03. Hinton also testified that he was a peace officer. Thus he had the authority to arrest the Respondent for the felony committed in his presence. TEX. CODE CRIM. PROC. ANN. art. 14.01.

Furthermore, the facts known to the police indicated that some felony other than Perjury had been committed:

either Theft, Robbery, or Kidnapping. The evidence further showed that the Respondent's only known residence in Houston was the Fantich house. The Respondent obviously had been alerted to the fact that he was the focus of the police investigation. That justified a warrantless arrest under TEX. CODE CRIM. PROC. ANN. art. 14.04, as construed in *West v. State*, 720 S.W.2d 511 (Tex. Crim. App. 1986).

Finally, evidence established that the Respondent was a material witness regarding the investigation. A material witness for a matter pending before a grand jury may be detained under Texas law. TEX. CODE CRIM. PROC. ANN. art. 24.15. Hinton was at least attempting to comply with the terms of that statute.

(3) *Emergency Doctrine.* Facts known to the police established that three persons were missing and there was a strong likelihood of foul play. Yet the police did not know the whereabouts or condition of the missing persons. Hinton and the officers believed that the Respondent had information which might solve this mystery. Testimony at the hearing made it clear that the first concern of the police was for the safety of the missing persons, not the construction of a criminal case against the Respondent. The State unsuccessfully urged the trial court to hold that the public interest in protecting human life outweighed the personal privacy interests protected by the Fourth Amendment. Now this Court should so hold.

The rationale urged by the State here generally has been labelled the "emergency doctrine." This Court recognizes that "the need to protect or preserve life or avoid serious injury is justification for what would be otherwise

illegal absent an exigency or emergency." *Mincey v. Arizona,* 437 U.S. 385, 392, 98 S. Ct. 2408, 2413, 57 L.Ed.2d 290 (1978), quoting *Wayne v. United States,* 115 U.S. App. D.C. 234, 241, 318 F.2d 205, 212 (opinion of Burger, J.). Lower federal courts have applied this doctrine to Fourth Amendment questions, whether denominated as the "emergency doctrine" or as "exigent circumstances". *United States v. Good,* 780 F.2d 773 (9th Cir. 1986); *United States v. Jones,* 635 F.2d 1357 (8th Cir. 1980). See also the cases cited in footnotes 6 and 7 of *Mincey, supra.* The essence of the doctrine is that the interest in protecting human life outweighs the privacy interests which underlie the Fourth Amendment. Concededly the foregoing cases have applied the doctrine in the context of searches rather than the context of arrest and detention, but the balance between the interests protected by the Fourth Amendment and the public interest in protecting human life should tilt in favor of the latter in the arrest context as well. Given reason to believe that the Respondent was the best source of information that might allow the police to save three lives, and given that the Respondent's continued contact with the police was necessary to carry on questioning, the detention of the Respondent here was as necessary as the warrantless entries and searches were in the aforementioned cases.

Perhaps the use of the term "emergency" is unfortunate, as illustrated by the Respondent's argument to the trial court that an "emergency", for purposes of this doctrine, is limited by a short time frame. Here the evidence showed an investigation lasting over several days. Logically, the justification for police conduct should continue for as long as the circumstances indicate the possibility of pre-

venting the loss of human life.[12] This Court has not had occasion to apply that logical principle in order to extend the time frame of the emergency doctrine, though *Mincey* applied similar logic in finding that an emergency justification for a search no longer existed once the police accounted for all persons in potential danger.

(4) *Attenuation.* The State also argued that, even assuming the arrest violated the Fourth Amendment, the written confession was sufficiently removed from the illegality to purge the taint. *Brown v. Illinois,* 422 U.S. 590, 95 S. Ct. 2254, 45 L.Ed.2d 416 (1975), discussed the circumstances following an illegal arrest which might provide sufficient attenuation between the arrest and the confession to overcome the impact of a Fourth Amendment violation. *Brown,* 422 U.S. at 603-604, 95 S. Ct. at 2261-2262, listed four factors to consider, though it did not say that this list was exhaustive: warnings pursuant to *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct.[13]

Regarding the "flagrancy" of the police "misconduct," the hearing testimony and the record make it abundantly clear that Hinton and the police officers believed there

---

12. If anything, the emergency character of a probable kidnapping becomes more acute with the passage of time.

13. The Texas Court of Criminal Appeals has followed the *Brown* analysis, both in deciding Fourth Amendment issues and in analyzing claims under Texas arrest statutes. *Self v. State,* 709 S.W.2d 662, 665 (Tex. Crim. App. 1986).

were valid bases for detention.[14] Despite assertions made in the majority opinion in *Wilkerson,* there was no "flagrant" misconduct by the police.

The time factor also favored a finding of sufficient attenuation. Any effect of the detention on January 24 was cured when the Respondent was released on January 25. On January 26 Hinton told the Respondent that he was "under arrest," and the Respondent stayed in the hospital overnight. He was taken to the Houston Police station around noon the next day. After being questioned by Robbery Division officers for a period of two hours, the Respondent was taken to the Fantich home, then to the District Attorney's office. There he had a conversation with Mrs. Fantich, which the Respondent had requested. The Respondent's oral confession to Detective Musick did not occur until 4:00 that afternoon. The written confession was prepared after that. In short, the Respondent had ample time for cool reflection and for consultation with anyone he desired.

While the warnings required by *Miranda, supra,* are not sufficient to purge the taint of an illegal arrest, the repeated *Miranda* warnings herein favor a finding of attenuation.

Most important in these cases are the intervening circumstances. The Respondent's request to consult with Mrs. Fantich was granted. At that time Mrs. Fantich

---

14. Although the Respondent's counsel challenged Hinton's compliance with statutory provisions for detaining material witnesses, the record shows that efforts were made to schedule a court hearing on that very matter. The hearing was delayed, and in the end it never was conducted because the Respondent had indicated his desire to give a statement after he had a chance to converse with the wife of Don Fantich.

was not acting as a police agent. Equally important is that the Respondent met his attorney, Mr. Dailey, before giving the written confession. They specifically discussed the advisability of giving a written confession, and the Respondent told Dailey that he had made up his mind. What stronger evidence of attenuation could there be?

For any of the foregoing reasons, this Court should grant the writ of certiorari.

II.

WAS *EDWARDS V. ARIZONA* VIOLATED?

The central holding of the majority opinion in *Wilkerson* was that the Respondent's written confession was obtained in violation of *Edwards v. Arizona*. For either of two reasons, this Court should hold that the Respondent's confession was not the fruit of a violation of *Edwards v. Arizona*.[15]

(a) The *Wilkerson* Dissent Was Correct

This Court should hold that the written confession, or at least an oral confession which followed it, was cured of the taint of any *Edwards* violation. By implication, *Edwards* allows interrogation to continue after access to counsel is provided. 451 U.S. at 484-485, 101 S. Ct. at 1885. In the dissenting opinion in *Wilkerson*, four judges held that any *Edwards* violation was cured

---

15. This Court denied the State's first petition for writ of certiorari on this question as well as the other questions raised. The denial of certiorari does not mean, however, that this Court was in agreement with the Court of Criminal Appeals' majority. *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 70 S. Ct. 252, 94 L.Ed. 562 (1950).

by the contact between the Respondent and counselor Dailey prior to preparation of the written confession, wherein the Respondent told Dailey that he was aware of what he was doing and that he had made the decision to give the confession.

The curative effect of contact with counsel was doubly applicable to oral statements made by the Respondent following completion of the written confession. The Respondent and counselor Dailey met again after the written confession. After that meeting, the Respondent told Detective Musick that he would show the police where David Roeder's apartment was located. This statement, as well as conversation while accompanying the police, was after the Respondent was *twice* given access to counsel that evening.[16] At the very least, the oral statements following the written confession should have been deemed admissible.[17]

(b) No *Edwards* Violation Occurred

Even the dissenters in *Wilkerson* had held that the Respondent's Fifth Amendment right to counsel had been invoked at the hospital on the evening of January 26, 1978. In so concluding, both factions in *Wilkerson* relied on *Stone v. State,* 612 S.W.2d 542 (Tex. Crim. App. 1981). In *Stone,* as in these cases, it was an attorney, not the suspect, who gave instructions that no interroga-

16. The Respondent and Dailey also had extensive contact over a period of time before the confrontation in the hospital.

17. Although Texas law severely limits the admission of oral statements, oral statements which contain assertions of fact which are found to be true and which conduce to establish the guilt of the accused are admissible. TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(c).

tion was to occur in counsel's absence. After *Wilkerson* was decided, however, the Court of Criminal Appeals concluded that the Fifth Amendment privilege against self-incrimination "is personal, and cannot be invoked or waived by anyone other than the accused." *Dunn v. State,* 696 S.W.2d 561, 567 (Tex. Crim. App. 1985), *cert. denied* ____U.S.____, 106 S. Ct. 1478, 89 L.Ed.2d 732 (1986). Although the opinion referred to self-incrimination, the specific controversy in *Dunn* concerned the presence of counsel during interrogation. It may be inferred that, after *Dunn,* the Court of Criminal Appeals would view the *Edwards* prophylactic rule as being triggered only by a suspect's invocation of the right to counsel, *not* by a demand made by an attorney. The conviction in *Dunn* was reversed under reasoning which this Court rejected in *Moran v. Burbine,* 475 U.S. ____, 106 S. Ct. 1135, 89 L.Ed.2d 410 (1986). This Court was not called upon in *Moran v. Burbine* to decide whether counsel may invoke the Fifth Amendment right to the presence of counsel during interrogation, but footnote 4 in the majority opinion suggests that this Court would hold that the Fifth Amendment right to counsel may be invoked only by the accused. 475 U.S. at ____, 106 S. Ct. at 1147. That view would be compatible with *Fuentes v. Moran,* 572 F.Supp. 1461 (D.R.I. 1983), *aff'd* 733 F.2d 176 (1st Cir. 1984) and with this Court's applications, in other contexts, of the principle that the privilege against self-incrimination is personal. See the cases cited in *United States v. Nobles,* 422 U.S. 225, 233, 95 S. Ct. 2160, 2167, 45 L.Ed.2d 14 (1975). This Court should hold that counselor Dailey's statement that interrogation should not continue in his absence did not invoke the Respondent's Fifth Amendment right to counsel. *Edwards* was not even applicable.

III.

WAS CUSTODIAL INTERROGATION JUSTIFIED UNDER THE EMERGENCY DOCTRINE?

The Petitioner also argued to the trial court that the written confession, or at least the oral confession preceding it, was justified under the emergency doctrine, made applicable in the Fifth Amendment context in *New York v. Quarles,* 467 U.S. 649, 104 S. Ct. 2626, 81 L.Ed.2d 550 (1984). Obviously the Court of Criminal Appeals had no opportunity to consider the application of *Quarles* in *Wilkerson,* decided a year before *Quarles.* While *Quarles* spoke in terms of a "public safety" exception to the prophylactic rules of *Miranda,* the analysis showed that it was essentially the same concept as the "emergency doctrine" found in the Fourth Amendment context.

In the instant cases the violation perceived by the Court of Criminal Appeals and the trial court was, as in *Quarles,* a violation of a caselaw prophylactic rule rather than actual compulsion of self-incrimination. The interrogation was motivated, at least in part, by concern for the safety of three members of the public. If anything, that concern was established more clearly here than in *Quarles.* The Respondent argued to the trial court that *Quarles* is distinguishable because of the long time frame involved here. *Quarles* stated, however, that *"so long as* the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety . . ." 467 U.S. at 657, 104 S. Ct. at 2632 (emphasis added). Apparently this Court realized that some kinds of threats to human life do not dissipate with time. Here, the threat

to life inherent in kidnapping was a continuing one. *Quarles* also noted that the very administration of *Miranda* warnings could have frustrated the protection of public safety by deterring Quarles from answering. Likewise, strict compliance with *Edwards* in these cases would have frustrated police efforts to determine whether the kidnap victims could be rescued alive.

It might be argued that the emergency or public safety justification was dissipated after the Respondent gave his first oral statement, in which he indicated his belief that the victims were dead. Of course the police could not be sure, even at that point. Even if this justification did not support the admission of the written confession, however, it should have justified admission of the first oral confession.

IV.

WAS EVIDENCE OTHER THAN THE RESPONDENT'S STATEMENTS ADMISSIBLE UNDER THE DOCTRINE OF INEVITABLE DISCOVERY?

The central premise of the Respondent's motion to suppress the jewelry, the murder weapons, the bodies of the victims, and the possible testimony by accomplices was the contention that these items of evidence were the "fruits" or products of the unlawfully obtained confession. As such, the Respondent contended, these items of evidence must be excluded under *Wong Sun v. United States,* 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1983).[18]

---

18. The Respondent's suppression motion also cited TEX. CODE CRIM. PROC. ANN. Art. 38.23, which provides:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of

In response the State argued *inter alia* that all or most of the items of evidence in question would have become available to the police anyway. That argument rested on the doctrine of inevitable discovery.[19]

This Court applied the doctrine of inevitable discovery in the context of unlawful confessions in *Nix v. Williams,* 467 U.S. 431, 104 S. Ct. 2501, 81 L.Ed.2d 377 (1984). Based on evidence that a search, if not called off after Williams talked, would have extended to the site of a murder victim's body, this Court held that evidence relating to the body was admissible because discovery of the body was inevitable. In the instant cases the trial judge rejected the inevitable discovery doctrine because the State had not shown that the inevitability of discovery was nearly a "certainty." That was at odds with this Court's discussion in *Nix, supra* at fn. 5, of the

---

Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

Article 38.23 does not provide a reason for excluding evidence, but merely the mechanism for doing so. Thus resort to Article 38.23 merely begs the question of whether a constitutional violation was committed by the police. The suppression motion did not contend that any of the evidence in question was taken in violation of some Texas statute. See Appendix B. As previously shown, Texas statutory law authorized the arrest of the Respondent. Texas statutory law regarding the admissibility of a confession focuses on the broad concept of voluntariness and on administration of warnings, with no provision corresponding to *Edwards v. Arizona.* In any event, the trial judge primarily based his rulings on the application of the decision in *Wilkerson,* and the *Wilkerson* opinion clearly did not rest on Texas statutory grounds. There was no "independent" Texas law basis for the trial judge's suppression orders.

19. The Court of Criminal Appeals recognizes this doctrine. *Vanderbilt v. State,* 629 S.W.2d 709, 722 (Tex. Crim. App. 1981), *cert. denied* 456 U.S. 910, 102 S. Ct. 1760, 72 L.Ed.2d 169 (1982); *Miller v. State,* 667 S.W.2d 773 (Tex. Crim. App. 1984).

proper burden of proof, i.e. a preponderance of the evidence.

The inevitable discovery argument in these cases is based on the fact that the police already had information which would have led them to David Roeder. While this information was in bits and pieces, Musick explained how suspects can be identified and located from such bits of information.[20] It was only a matter of time until the police determined the identity of David Roeder, his address, and the existence of the Roeder family farm in Shiner. Information linked David Roeder with the Respondent, who was known to be Don Fantich's associate, and with delivery of some jewelry to the "fence." Detective Musick also described the location of various items of evidence found at the farm and how they could be found. Thus there was an independent avenue of investigation which was open to the police, which not only indicated Roeder's culpability but also made it likely that evidence hidden at the farm would be found.

The trial judge declared that the Petitioner had not shown certainty of discovery. The Petitioner disagrees, but what matters here is that there was no testimony to contradict that of Detective Musick. The Petitioner met its "preponderance" burden of proof. Nor does the trial court's ruling square with common sense, which dictates that the police would pursue all possible leads when

---

20. A name and description, Musick explained, may be sufficient to obtain information recorded by the Department of Public Safety when a driver's license is issued, including an address and a photograph. A phone number also can be linked to a location where the telephone is placed. Once it was determined that the phone in question was in an apartment, additional information would be available from apartment leasing records.

dealing with such a serious crime. It is true that Musick's testimony at the May 11 hearing did not provide every detail of what the police would have done in tracking down Roeder and searching the farm, but the burden of proof at a suppression hearing should not require an exhaustive discussion of minutiae. At the very least, the Petitioner should be given the opportunity to develop the relevant evidence further.

V.

WOULD THE TESTIMONY OF ACCOMPLICES OR OTHER EVIDENCE BE ADMISSIBLE UNDER *MICHIGAN V. TUCKER?*

Even if this Court rejects every other reason for granting the writ, the issue remains whether the testimony of Roeder, Cass, or Avila would be admissible in spite of an *Edwards* violation. This Court has already suggested the answer to that question in *Michigan v. Tucker*, 417 U.S. 433, 94 S. Ct. 2357, 41 L.Ed.2d 182 (1974).[21] Additionally, one federal court has suggested that physical evidence may become admissible under a *Tucker* rationale. The Petitioner pointed out the applicability of *Tucker* three times in the trial court. The trial court never explained why *Tucker* would not be followed. This Court should grant the petition for certiorari and direct the trial court to rescind at least the part of the suppression order pertaining to the possible testimony of accomplices Roeder, Cass, and Avila.

---

21. The Fourth Amendment issue is no impediment to application of *Tucker*. *United States v. Ceccolini*, 435 U.S. 268, 98 S. Ct. 1054, 55 L.Ed.2d 268 (1978) held, under a *Tucker* type of rationale, that a Fourth Amendment violation did not justify suppression of testimony by a live witness.

Tucker considered a situation which was remarkably similar to the facts shown here. Tucker was interrogated before the *Miranda* decision was handed down. The interrogating officers failed to administer all of the warnings required by *Miranda.* Though there was a violation of the prophylactic rules of *Miranda,* this Court noted three important factors which influenced the disposition of the case. First, the violation was not of the Fifth Amendment itself, but rather of prophylactic rules developed in caselaw to buttress the protection afforded by the Fifth Amendment.[22] Second, the officers could not be faulted for failing to anticipate the *Miranda* decision. Third, public policy favors admission of all relevant and trustworthy evidence. Accordingly, while the statement itself would have been inadmissible, this Court declined to extend the "fruit of the poisonous tree" doctrine expressed in *Wong Sun* to the point of suppressing the testimony of a witness whose identity was revealed during the confession. As this Court correctly observed, that would not advance the protective function the exclusionary rule was designed to serve. 417 U.S. at 446-449, 94 S. Ct. at 2365-2366. It would have merely penalized the police for not having a crystal ball. This Court adhered to the rationale of *Tucker* in *Oregon v. Elstad,* 470 U.S. 298, 105 S. Ct. 1285, 84 L.Ed.2d 222 (1985).[23] The question

---

22. This important distinction also was noted in *Burbine, supra, Quarles, supra* and in *Connecticut v. Barrett,* _____U.S._____, 107 S. Ct. 823, 832, _____L.Ed.2d_____ (1987).

23. *Elstad* held that after one statement was obtained from Elstad in violation of *Miranda,* a second one given after compliance with *Miranda* would be admissible. *Tucker* was cited in repudiation of the argument that the second one was the product of the first one under a "cat out of the bag" theory. *Elstad* also lends support to the Petitioner's argument that the second oral statement, given after two contacts with counsel, would be admissible, notwithstanding inadmissibility of the written confession.

of the admissibility of testimony by Roeder, Cass, or Avila calls for a straightforward application of *Tucker*, the only difference being that the retroactive prophylactic rule that was infringed was that of *Edwards* rather than one from *Miranda*.

In these cases, as in *Tucker*, there was no violation of the Fifth Amendment itself. Instead *Wilkerson* found fault with the compliance by the State with the prophylactic rule set forth in *Edwards*. Yet *Wilkerson* did not say that the police and Mr. Hinton should have anticipated *Edwards*. Even the trial judge recognized that the police had not acted in bad faith, but he believed he was bound by the *Wilkerson* decision. The flaw in that reasoning was that *Wilkerson* did not consider *Tucker*.

In addition to a conventional application of *Tucker*, these cases raise the issue which was addressed in *Keister v. Cox*, 307 F.Supp. 1173 (W.D. Va. 1969), a case preceding *Tucker*. Can physical items of evidence be admissible under a *Tucker* rationale? This issue was left open in *Quarles*, 467 U.S. at ____, fn. 9, 104 S. Ct. at 2634, but it was mentioned in Justice Brennan's *Elstad* dissent. 470 U.S. at ____, fn. 29, 105 S. Ct. at 1313. To a degree this question interlocks with the issue of inevitable discovery, in that there should be a strong policy in favor of admitting tangible items which would have become available regardless of any illegal procedure used in obtaining a confession. These cases provide an appropriate opportunity to extend *Tucker* to physical evidence.

CONCLUSION

For the aforesaid reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

JOHN B. HOLMES, JR.
District Attorney
Harris County, Texas

DON R. STRICKLIN
WINSTON E. COCHRAN, JR.
Assistant District Attorneys

CALVIN A. HARTMANN
Assistant District Attorney
Chief of the Appellate Section
Counsel of Record

201 Fannin, Suite 200
Houston, Texas 77002
Tel.: 713/221-5826

Attorneys for Petitioner

APPENDIX A

The following excerpt contains the trial court's ruling regarding the admissibility of the Respondent's written confession in Numbers 272,379 and 272,380. This ruling was made on April 6, 1987, at the conclusion of a hearing which commenced on March 31, 1987 and continued over a period of a week. The court reporter is in the process of preparing a complete transcription of the hearing.

RULING OF THE COURT

THE COURT: The Court does find as a fact that there was a sufficient invocation of the right to Counsel and the withdrawal from any further discussion as of Thursday, January 24th.*

As a result we then go into the situation to see if there has been or was an express initiation by the Defendant shown by any evidence in the case. The Court finds none. There is an inference that there was an acquiescence at least; however, the Court cannot find anything that would meet the requirements of the Appellate Courts, especially in the Edwards matter.

Even after considering the Fourth Amendment matter the Court does not find probable cause existing for the Defendant's arrest and even if probable cause did exist, there is no exigent circumstances shown by the State that would have prevented the State from obtaining a warrant had it desired to.

The Court is going to grant each of the Defendant's Motions.

MR. SCHNEIDER: Thank you, Your Honor.

Your Honor, may we approach the Bench?

THE COURT: Yes.

(Whereupon there is a discussion at the Bench between the Court, Counsel for the State and Counsel for the Defendant, said discussion being held out of the hearing of the Court Reporter.)

---

* That Thursday actually was January 26, 1978.

MR. STRICKLIN: Note our exception.

THE COURT: The Wilkerson matter will be set for submission of briefs on April the 21st and will be set for a Hearing on May 11th.

The Court will stand recessed until 9:00 o'clock tomorrow morning.

Oh, for the Record, the Defendant will not be required to be here on the—

MR. STRICKLIN: Twenty-first.

THE COURT: —on the April 21st setting.

* * *

APPENDIX B

This appendix contains the Respondent's motion to suppress the oral statements, physical evidence, and testimony by accomplices. This motion was granted in all respects at the conclusion of a hearing conducted on May 11, 1987. The order signed by the trial court is included here. Also included is an excerpt containing the trial judge's explanation for his ruling on May 11. The court reporter is in the process of preparing a complete transcription of the hearing.

CAUSE NO. 272,378
272,379
272,380

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
208TH JUDICIAL DISTRICT

THE STATE OF TEXAS

v.

CLAUDE LEE WILKERSON

(Filed April 6, 1987)

MOTION TO SUPPRESS THE EVIDENCE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, CLAUDE LEE WILKERSON, Defendant in the above styled and numbered causes, by and through his attorney of record, STANLEY G. SCHNEIDER, and files this motion to suppress the evidence derived from an illegal confession and would show this Honorable Court the following:

I.

In *Wilkerson v. State,* 657 S.W.2d 784 (Tex. Crim. App. 1983) cert. den'd 105 S. Ct. 1371 (1984), the Court ruled that this Defendant's confession was involuntarily obtained in violation of his right to counsel. All evidence derived as a result of his illegal confession must be suppressed as "fruit of the poisonous tree" as set forth in *Wong Sun v. United States,* 371 U.S. 471 (1963). *Wong Sun* provides that evidence obtained as a result

of the illegally obtained confession is tainted and thereby inadmissible. However, the "fruits of the poisonous tree" doctrine is not applicable when the evidence is obtained from a source independent of the State's wrongful act. *Costello v. United States,* 365 U.S. 265 (1961); *see also, Taylor v. Alabama,* 457 U.S. 687 (1982); *Brown v. Illinois,* 422 U.S. 590 (1975); *United States v. Ceccolini,* 435 U.S. 268 (1978). In *Porier v. State,* 662 S.W.2d 602 (Tex. Crim. App. 1984), the Court of Criminal Appeals held that a consent to search as well as evidence obtained as a result of the search, which was conducted pursuant to an illegal confession were fruits of the illegal confession which thereby must be excluded. See also, *Foster v. State,* 677 S.W.2d 507 (Tex. Crim. App. 1984); *Coleman v. State,* 643 S.W.2d 947 (Tex. Crim. App. 1982). In *Noble v. State,* 478 S.W.2d 83, 84 (Tex. Crim. App. 1972), the Court of Criminal Appeals reversed Noble's conviction because there was no showing that the hood, knife and other evidence derived from his confession would have been obtained anyway by means sufficiently distinguishable from Noble's illegally obtained confession. *See also, Pitts v. State,* 614 S.W.2d 142 (Tex. Crim. App. 1981). In *Nicholas v. State,* 502 S.W.2d 169, 172 (Tex. Crim. App. 1973), an eleven year old prosecutrix' identity was suppressed because there was no showing by the State that her identity could have been found by means others than the negatives that were obtained illegally. *See also, Santiago v. State,* 681 S.W. 2d 806 (Tex. App.—Houston 1984); *Bennett v. State,* 686 S.W.2d 235 (Tex. App.—Amarillo 1984).

II.

The record in this cause affirmatively shows that the following evidence was directly derived from the defend-

ant's confession. There is no independent source available for the State to allege as a basis for its discovery of the evidence. There is no intervening circumstance between the defendant's confession and the discovery of the resulting evidence. The evidence that must be suppressed is as follows: 1) the identity and person of Mark Cass; 2) the identity and person of David Roeder; 3) all evidence derived from the apartment on Sherwood Lane; 4) the identity and person of Bobby Avila; 5) the body of deceased/complainant Fitzpatrick; 6) the body of deceased/complainant Fantich; 7) the body of deceased/complainant Rose; 8) weapons found at Roeder Ranch in Shiner, Texas; 9) jewelry found at the Roeder Ranch in Shiner, Texas.

III.

The defendant asserts that since there is no independent source to support the admission of the foregoing evidence, the foregoing evidence must be suppressed and ruled inadmissible at any future trial.

WHEREFORE, PREMISES CONSIDERED, the Defendant prays that this Court suppress any and all evidence derived from the illegally obtained confession and for any and all other relief to which he may be entitled.

Respectfully submitted,

/s/ STANLEY G. SCHNEIDER
Stanley G. Schneider
TBC #17790500
5300 Memorial Drive, Suite 1000
Houston, Tx 77007
(713) 864-0362

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion was served on Assistant District Attorney, Don Stricklin, 201 Fannin Street, Houston, Tx 77002, on this the _____ day of July, 1986.

/s/ STANLEY G. SCHNEIDER
Stanley G. Schneider

ORDER

On this the 11th day of May, 1987, the Court having duly considered the foregoing motion finds that the following evidence is not admissible at the trial of this cause: 1) the identity and person of Mark Cass; 2) the identity and person of David Roeder; 3) all evidence derived from the apartment on Sherwood Lane; 4) the identity and person of Bobby Avila; 5) the body of deceased/complainant Fitzpatrick; 6) the body of deceased/complainant Fantich; 7) the body of deceased/complainant Rose; 8) weapons found at Roeder Ranch in Shiner, Texas; 9) jewelry found at the Roeder Ranch in Shiner, Texas.

Signed and entered on this the 11th day of May, 1987.

/s/ T. H. ROUTT
Judge Presiding

PROCEEDINGS

THE COURT: When the Court looks at the tainting, having found a tainting earlier, both sides recognize that it then becomes a matter of removal of that tainting.

The State has suggested there was removal of that tainting by several factors in each of the subsequent statements.

The Defense has suggested that there is no such removal. The Court does not find sufficient interruption of independent source of the effect of the previous violation.

In spite of the passage of time, the Court finds that there was almost constant contact, excepting for the last portion of the time period where "refreshments were shared."

I don't feel that that's sufficient to interrupt or dissipate the effect of the previous violation, and it is without condemnation that I call this a violation. I don't find it as blatant as counsel has termed it.

I do not find the appropriate application of the emergency doctrine here. As to inevitable discovery, I think, at most, the State has shown a possibility of this evidence being discovered from independent sources; but I think independent discovery calls for almost certainty, certainly a strong probability, that the evidence would have been discovered without anything from the defendant.

Even assuming establishment of the identification of Roder, considerably more at that time would have been necessary to establish probable cause for any legal process that would have resulted in either the search of his

apartment, his arrest, or the search and seizure of any evidence in those places or on the farm of his parents.

The motion of the Defense to suppress this evidence also will be granted.

MR. SCHNEIDER: Your Honor, an order as to our motion to suppress—the original, I believe, is on file with the Clerk—the order reads, "On this the blank day of blank"—which would be the 11th day of May— "1987, the Court having duly considered the foregoing motion finds that the following evidence is not admissible at the trial of this cause:

"(1) The identity and person of Mark Richard Cass;

"(2) The identity and person of David Roder;

"(3) All evidence derived from the apartment on Sherwood Lane;

"(4) The identify and person of Bobby Avila;

"(5) The body of the deceased complainant Fitzpatrick;

"(6) The body of the deceased complainant Fantich;

"(7) The body of the deceased complainant Rose;

"(8) Weapons found at the Roder Ranch in Shiner, Texas;

"(9) Jewelry found at the Roder ranch in Shiner, Texas."

THE COURT: The Court will sign this order understanding, however, that this has application to this defendant and to no other.

MR. SCHNEIDER: Yes, Your Honor.

(Whereupon these proceedings were concluded.)

APPENDIX C

This appendix includes the State's Motion to Reconsider Admissibility of Evidence, which was filed on May 26, 1987. At that time both sides presented additional arguments. The trial judge's order denying the State's motion also is included in this appendix. The court reporter is preparing a complete transcription of the hearing.

NOS. 272,378, 272,379 & 272,380

IN THE 208TH DISTRICT COURT OF
HARRIS COUNTY, TEXAS

THE STATE OF TEXAS

v.

CLAUDE LEE WILKERSON

(Filed May 26, 1987)

STATE'S MOTION TO RECONSIDER ADMISSIBILITY OF EVIDENCE

COMES NOW THE STATE OF TEXAS, through the undersigned Assistant District Attorney for Harris County, Texas, and respectfully requests that this Court reconsider its orders suppressing evidence, issued on April 6, 1987 and May 11, 1987. As grounds for this motion, the State submits the following arguments and authorities.

1. Regarding the application of the Fourth Amendment, the evidence showed three bases for warrantless arrest under Texas law, including Mike Hinton's authority to arrest the defendant for aggravated perjury. The defendant's detention as a material witness also was proper, in that the State was attempting to satisfy the requirements for detention of a material witness when the defendant made a conditional agreement to give a statement. Assuming arguendo that the Fourth Amendment was violated, the detention of the defendant was justified due to the unknown condition of three missing persons. Assuming arguendo that the Fourth Amendment was violated, the taint of the arrest was purged by other factors, justifying admission of oral and written con-

fessions, and especially justifying admission of other evidence which was even further removed from the arrest.

2. Regarding the application of *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L.Ed.2d 378 (1981), no violation occurred because only counselor Fred Dailey, not the defendant, invoked the Fifth Amendment right to counsel. Even if an *Edwards* violation occurred, it was justified due to the unknown condition of three missing persons. Contrary to the defendant's arguments, an "emergency" is not defined by a time frame but rather by the degree of necessity for police action. Furthermore, any violation of *Edwards* was cured by intervening circumstances, especially with regard to oral statements made after the written statement.

3. Evidence other than the defendant's written and oral statements would have been obtained anyway. The evidence established that the police were aware that David Roeder was a suspect, based on evidence linking Roeder to the stolen jewelry and on B. J. Shirley's information that Roeder had participated in a robbery with the defendant on December 24, 1977. Evidence showed that Roeder's apartment could be located, that Roeder's sister was available to provide information, and that the Roeder farm was a likely site for disposal of evidence. Evidence showed that Robert Avila resided at Roeder's apartment. Evidence showed that available techniques could have disclosed the location of the corpses at the farm. Evidence also showed that weapons and jewelry were located with Roeder's cooperation. Roeder's cooperation was not shown to have been influenced by the defendant's confession. In that regard, the State could not call Roeder as a witness, but the defendant had Roeder available as a witness on May 11, yet failed to call him.

Alternatively, if the Court is of the opinion that further evidence is necessary in order to justify reliance on the inevitable discovery concept, the State prays that the Court allow the State to present further evidence.

4. The possible testimony of codefendants is admissible even if there was an *Edwards* violation, under *Michigan v. Tucker*, 417 U.S. 433, 94 S. Ct. 2357, 41 L.Ed.2d 182 (1974).

WHEREFORE the State prays that the foregoing motion be granted, in whole or in part, and that this Court rescind, in whole or in part, its orders suppressing evidence in these cases.

Respectfully submitted,

/s/ DON R. STRICKLIN
Don R. Stricklin
Assistant District Attorney
Harris County, Texas
201 Fannin, Suite 200
Houston, Texas 77002
(713) 221-5814
TBC No. 19390500

CERTIFICATE OF SERVICE

I, Don R. Stricklin, First Assistant District Attorney for Harris County, Texas, certify that a copy of the foregoing Motion was personally served on the defendant's counsel, Hon. Stanley Schneider, on May 26, 1987.

/s/ DON R. STRICKLIN
Don R. Stricklin
Assistant District Attorney
Harris County, Texas

NOS. 272,378, 272,379 & 272,380

IN THE 208TH DISTRICT COURT OF
HARRIS COUNTY, TEXAS

THE STATE OF TEXAS

v.

CLAUDE LEE WILKERSON

ORDER

Having considered the State's Motion to Reconsider Admissibility of Evidence, the Court hereby orders:

That the motion be in all things ~~granted.~~

That the motion be in all things (denied.)

That the motion be granted in part and denied in part, and the following items of evidence shall be admissible:

Tangible items found in David Roeder's apartment,

Tangible items found at the Roeder farm,

The corpses of the three murder victims,

Items found in the possession of David Roeder,

Testimony by David Roeder,

Testimony by Robert Avila,

Testimony by Mark Cass.

/s/ T. H. ROUTT
Hon. Thomas Routt, Judge
208th District Court
Harris County, Texas

DATE: MAY 26, 1987